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No. 01-449

In the Supreme Court of the United States

DR. DONALD C. AUSTIN,

Petitioner,

vs.

AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Supreme Court Rule 14 requires that a Petition for Writ of Certiorari shall contain "[T]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." The Rule further requires that "[T]he questions should be short and should not be argumentative or repetitive." The questions presented by the Petitioner fail to comply with the Rule in that they improperly argue and/or suggest that only surgeons who testify for plaintiffs are subject to punishment under the Association's disciplinary procedures.

A proper statement of the questions will assist the Court in determining whether to grant or deny the Petition. The Respondent accordingly presents this Court with the following questions:

(1) Whether a disciplinary action taken by a private association with respect to one of its members is subject to judicial review under Illinois law where the member fails to show that an important economic interest is at stake.

(2) Whether a private, voluntary association of neurological surgeons may discipline one of its members who fails to abide by the association's code of ethics and expert witness guidelines applicable to all members who testify as expert witnesses in legal proceedings.

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Respondent, the American Association of Neurological Surgeons, hereinafter referred to as "AANS", is the party responding to the Petition for Writ of Certiorari. The AANS is an Illinois not-for-profit organization with a membership comprised of neurosurgeons. The AANS has no stock and, accordingly, there is no parent or publicly held company that owns 10% or more of the Association's stock.

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COUNTER-STATEMENT OF THE CASE

At its core, this case concerns an internal disciplinary proceeding held by the American Association of Neurological Surgeons ("AANS") with respect to one of its members. The AANS is a private, voluntary association of neurological surgeons whose primary purpose is to promote the advancement and pursuit of excellence in neurological surgery. Petitioner, Dr. Donald C. Austin ("Dr. Austin"), was a member of the AANS from 1963 to 1997, when he was suspended for six months for violating the AANS' Code of Ethics and Expert Witness Guidelines. Upon the effective date of his suspension, April 14, 1997, Dr. Austin resigned from the AANS and never attempted to reinstate his membership.

The disciplinary proceeding against Dr. Austin stemmed from expert witness testimony he provided on behalf of the plaintiff in a medical malpractice action against Dr. Q. Michael Ditmore, a neurological surgeon and member of the AANS. The plaintiff in that action sustained permanent injury to her recurrent laryngeal nerve after an anterior cervical fusion surgery performed by Dr. Ditmore. Dr. Austin opined that the mere existence of a permanent recurrent laryngeal nerve injury establishes surgical negligence and that the neurosurgical community generally accepted his opinion. The jury returned a verdict in favor of Dr. Ditmore and against the plaintiff.

Subsequent to the conclusion of the malpractice action, Dr. Ditmore exercised his right under the AANS' Bylaws to file a charge of unprofessional conduct against Dr. Austin. Dr. Ditmore asserted that Dr. Austin's testimony had violated the AANS' Code of Ethics and Expert Witness Guidelines. The AANS' Code of Ethics mandates

that a member who testifies as an expert witness shall "diligently and thoroughly prepare himself or herself with relative facts so that he or she can, to the best of his or her ability, provide the court with accurate and documentable opinions on the matters at hand." The Expert Witness Guidelines require that prior to offering expert testimony, a member should, *inter alia*, become familiar with all pertinent data of the particular matter at issue; review prior and current concepts related to standard neurosurgical practice in the matter at issue; and identify as such, personal opinions not generally accepted by other neurosurgeons.[1]

The AANS' Professional Conduct Committee ("PCC"), which processes charges of unprofessional conduct of any nature brought by one member against another, held a formal hearing on Dr. Ditmore's charge against Dr. Austin on October 15, 1995. Dr. Ditmore and Dr. Austin both attended the hearing and were represented by counsel. The PCC concluded that Dr. Austin violated the AANS' Code of Ethics and Expert Witness Guidelines in an "egregious manner" and recommended in its written report that Dr. Austin be suspended from AANS membership for a period of six months.

On April 26, 1996, the AANS' Board of Directors approved by secret ballot the PCC's recommendation to suspend Dr. Austin for a six-month period. As was his right under the AANS' Bylaws, Dr. Austin elected to appeal the suspension to the AANS' general membership

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[1] The AANS' Expert Witness Guidelines encourage member neurosurgeons to testify impartially and prudently for both plaintiffs and defendants in matters brought before the courts.

at its next annual meeting on April 14, 1997. The AANS' general membership sustained the Board's suspension of Dr. Austin.

On December 1, 1998, Dr. Austin filed his complaint against the AANS, alleging that his suspension "was influenced by bias and prejudice and not made in good faith." Dr. Austin sought damages measured by the decline in his expert-witness income as a result of the suspension. In addition to monetary relief, Dr. Austin sought a mandatory injunction directing the AANS to expunge the record of the suspension.

The district court granted the AANS' motion for summary judgment, concluding that Dr. Austin failed to make a showing sufficient to warrant judicial interference in the internal affairs of a private association under Illinois law. The district court observed that under Illinois law, "the only bases for a court's power to interfere in the internal operations of a private association are violation of internal association rules, deprivation of due process, or bad faith." (Pet. App. 22.) As Dr. Austin failed to demonstrate violation of internal association rules, deprivation of due process or bad faith, the district court determined that "he loses as a matter of law." (Pet. App. 22.)

The Seventh Circuit affirmed the entry of summary judgment by the district court. Writing for the court, Judge Posner observed that dismissal of the suit was correct because Dr. Austin failed to show that an important economic interest, as the term is defined under Illinois law, was at stake. The court noted that membership in the AANS is not a precondition to Dr. Austin's primary profession, the practice of neurosurgery. (Pet. App. 7.) The court flatly rejected Dr. Austin's argument

that a decline in his expert-witness income constituted an important economic interest, stating that a decline in "moonlighting income" is not the kind of "professional body blow that the cases have in mind when they speak of an important economic interest jeopardized by the action of a voluntary association." (Pet. App. 8.)

The court of appeals also found that there was no basis for Dr. Austin's claim that the AANS only entertains complaints against members who testify on behalf of malpractice plaintiffs:

> What is true is that to date all complaints (but there have been very few) have been against such members; but the reason is at once obvious and innocent. If a member of the Association is sued for malpractice and another member gives testimony for the plaintiff that the defendant believes is irresponsible, it is natural for the defendant to complain to the Association; a fellow member has irresponsibly labeled him negligent. If a member of the Association who testifies for a plaintiff happens to believe that the defendant's expert witness was irresponsible, he is much less likely to complain, because that expert (and fellow member of the Association) has not accused him of negligence or harmed him in his practice or forced him to stand trial or gotten him into trouble with his liability insurer. The asymmetry that Austin points to as evidence of bad faith is thus no evidence of bad faith at all; and he has no other evidence of bad faith.

(Pet. App. 8-9.) The court of appeals rejected Dr. Austin's argument that the AANS' Code of Ethics and Expert Witness Guidelines, as written and applied, impede the

cause of justice and violate public policy. The court concluded that "professional self-regulation" or "policing of expert witnessing" serves to further rather than impede the cause of justice. (Pet. App. 9-11.)

MISSTATEMENTS IN THE PETITION

The Petition contains numerous misstatements of fact. In compliance with Supreme Court Rule 15.1, the AANS notes the following misstatements contained in the Petition:

1. Petitioner asserts that the AANS' Professional Conduct Committee found that his testimony in the malpractice action was "unsupported by literature or logic." (Pet. 2.) Petitioner misstates the PCC's findings. The PCC concluded as follows:

> The Professional Conduct Committee has concluded that there is no convincing basis in either literature or logic for [Dr. Austin's] testimony that permanence of a recurrent laryngeal nerve injury establishes surgical negligence as its cause. Furthermore, the Committee feels Dr. Austin's assertion that this opinion is generally accepted by the neurosurgical community is entirely false. The Professional Conduct Committee believes that Dr. Austin is in violation of AANS Expert Witness Guidelines in that he failed to present to the court those opinions which represent the broad spectrum of neurosurgical thought and practice; and, more specifically, in violation of 16(a)(2) in that his testimony revealed that he did not adequately review prior and current concepts related to standard

> neurosurgical practice in the matter at issue; and 16(a)(4) in that he falsely represented his own opinion as that of the profession generally. From Dr. Austin's testimony cited above, the Committee also concludes that Dr. Austin did not diligently and thoroughly prepare himself with the relative facts and did not provide the court with accurate and documentable opinions as to the matter of permanent injury of the recurrent laryngeal nerve in anterior cervical fusions, in violation of Section V(B) of the AANS' Code of Ethics. The Committee believes that Dr. Austin's testimony in this case was a particularly egregious violation of AANS testimony guidelines.

(Report of the Professional Conduct Committee at 4-6.)

2. Petitioner asserts that "the only medical expert disclosed in pre-trial proceedings opined that Dr. Austin's testimony was correct." (Pet. 2, n. 1.) In making such an assertion, Petitioner vastly overstates the opinion of his own expert witness, Dr. Robert L. McLaurin. Dr. McLaurin opined that "permanent paralysis *usually* results from severe traction, compression, or actual diversion of the nerve" and that the nerve injury in the underlying medical malpractice action "was the result of a moderately severe or severe injury to the nerve." (McLaurin Report) (emphasis added). Dr. McLaurin did not opine that the mere existence of permanent injury establishes surgical negligence as its cause.

3. Petitioner states that he has "never contended that the procedures the AANS followed were unfair or inadequate." (Pet. 2, n. 2.) However, in his sworn Answers to Interrogatories, Petitioner asserted that the AANS failed "to conduct a fair and unbiased hearing." Further, in his

sworn Answers and Objections to the AANS' Second Set of Interrogatories, Petitioner charged that the October 15, 1995 hearing before the PCC was biased and unfair. Petitioner failed to develop any such evidence of unfairness during the course of discovery and he has now abandoned that as an element of his case.

4. Petitioner asserts "that the district court was presented with unrebutted evidence that the Expert Witness Guidelines under which Dr. Austin was punished were established by the AANS for the purpose of manipulating the manner in which the judicial system was handling medical malpractice cases." (Pet. 3.) Petitioner failed to make such a showing to the district court or the court of appeals. The 1976 report of the AANS' Professional Liability Committee, upon which Dr. Austin bases his assertion, completely undermines his claim:

> We would emphasize that the role of the expert witness is not to win the case for his client. That is the lawyers' role. The expert must confine his role to that of a technical resource, explaining and documenting the concerns, responsibilities and practices of a responsible neurosurgeon in the matter at issue. Slanting of testimony by an "expert" for either side is professionally abhorrent and the AANS has the duty, as the spokesman for American neurosurgery, to be sure that its members do not engage in these practices.

(Report of the Professional Liability Committee at 244.)

5. The Petition implies that the AANS' Expert Witness Guidelines were enacted on the heels of the 1976 report of the Professional Liability Committee. (Pet. 3-4.) However, it is undisputed that the current Expert Wit-

ness Guidelines were not adopted by the AANS' Board of Directors until December of 1983.

6. Petitioner asserts that "all prosecutions under the Expert Witness Guidelines" have been brought against members who testified on behalf of plaintiffs and that "[n]o defendant's expert has ever been charged." (Pet. 5.) However, Dr. Austin himself filed a charge of unprofessional conduct against a member he accused of giving improper expert testimony on behalf of a defendant surgeon. (Blackett Dep. at 20.)

7. Petitioner asserts that if an expert witness opinion cannot be found in the medical literature, the AANS' Code of Ethics prohibits its members from expressing that opinion in court. (Pet. 16.) Neither the AANS' Code of Ethics nor its Expert Witness Guidelines contain such language. The Code of Ethics mandates that a member who testifies as an expert shall "diligently and thoroughly prepare himself or herself with the relative facts" so as to provide the court with "accurate and documentable opinions on the matters at hand." The Expert Witness Guidelines require that members who testify as expert witnesses must identify as such, "personal opinions not generally accepted by other neurosurgeons."

REASONS FOR DENYING THE WRIT

The Seventh Circuit's decision does not warrant review. The decision below is in accord with well-settled principles of Illinois law pertaining to judicial review of the internal affairs of a private association. The ruling is also consistent with decisions of this Court as well as many others regarding the ability of a professional association to discipline its members for failing to abide

by the association's internal rules. Petitioner has stated no reasonable basis for review of the decision of the court of appeals and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE DECISION BELOW DOES NOT CONFLICT WITH ILLINOIS LAW PERTAINING TO JUDICIAL REVIEW OF THE INTERNAL AFFAIRS OF A PRIVATE ASSOCIATION.

Dr. Austin's Petition does not warrant review by this Court because the Seventh Circuit decided the case in accordance with Illinois law relating to judicial review of the internal affairs of a private association. The court of appeals determined that the entry of summary judgment was appropriate because Petitioner failed to show that "an important economic interest" was at stake. (Pet. App. 7.) The court of appeals' holding is correct and is not at odds with Illinois law as it pertains to private associations.

Under Illinois law, private associations have great discretion when conducting their internal affairs, especially when their conduct relates to the interpretation and enforcement of association rules and regulations. *International Test and Balance, Inc. v. Associated Air and Balance Council*, No. 98 C 2553, 1999 WL 377849, at *7 (N.D. Ill. Jun. 7, 1999); *Engel v. Walsh*, 101 N.E. 222, 223-224 (Ill. 1913); *Lee v. Snyder*, 673 N.E.2d 1136, 1139 (Ill. App. Ct. 1996). Judicial intervention in the internal affairs of a voluntary association is only appropriate when: (1) the operation of the association significantly harms an important economic interest of the plaintiff belonging to the association when it acted; and (2) the association either (a) failed to act in accord with its own

constitution and bylaws; (b) was influenced by bias, prejudice, or lacking in good faith; or (c) violated due process. *Van Daele v. Vinci*, 282 N.E.2d 728, 731-32 (Ill. 1972); *Finn v. Beverly Country Club*, 683 N.E.2d 1191, 1193 (Ill. App. Ct. 1997); *National Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285 (7th Cir. 1985).

Applying the above standard, the court of appeals found that Petitioner's six-month suspension from the AANS did not constitute harm to "an important economic interest" as defined under Illinois law. (Pet. App. 7-8.) The court of appeals observed that membership in the AANS is not a precondition to the practice of neurosurgery and that Petitioner continued to practice neurosurgery notwithstanding his suspension and subsequent voluntary resignation from the AANS.[2] (Pet. App. 7.) Under Illinois law, where membership in an association is optional, suspension/expulsion or denial of admission is not deemed the invasion of an important economic interest. *Treister v. American Academy of Orthopaedic Surgeons*, 396 N.E.2d 1225, 1231-32 (Ill. App. Ct. 1979); *Finn*, 683 N.E.2d at 1193; *Lee*, 673 N.E.2d at 1139. *See also San Juan v. American Bd. of Psychiatry and Neurology, Inc.*, No. 93 C 5806, 1994 WL 66077, at *1 (N.D. Ill. 1994) (plaintiff does "not come close" to satisfying economic necessity requirement where membership merely improves professional opportunities); *Kaneria v. American Bd. of Psychiatry and Neurology, Inc.*, 832 F. Supp. 1226, 1230 (N.D. Ill. 1993) (benefits such as additional salary, career advancement, service as expert witness, and enhanced recognition, although economi-

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[2] The Seventh Circuit also noted that the "AANS is not even the only association of such surgeons." (Pet. App. 7.)

cally desirable, clearly do not rise to the level of economic necessity).

Notably, the court of appeals rejected Petitioner's argument that the drop in his expert-witness income constituted an important economic interest jeopardized by the action of a voluntary association:

> True, his income from testifying has fallen to 35 percent of what it was before the suspension, when it was more than $220,000 a year. Austin's brief describes this drop in income as "disastrous" and "catastrophic," but that is a hyperbolic characterization. Thirty-five percent of $220,000 is a healthy $77,000—and this is merely as it were Dr. Austin's moonlighting income, income from a sideline to his primary profession, which is that of a neurosurgeon, not an expert witness (he does not claim the dubious title of "professional expert witness"). That is not the kind of professional body blow that the cases have in mind when they speak of an "important economic interest" jeopardized by the action of a voluntary association.

(Pet. App. 7-8.) The court of appeals further noted that, at the very least, the "association's action must jeopardize the principal source of the professional's livelihood, and not a mere sideline." (Pet. App. 8.)

Petitioner does not challenge, let alone acknowledge, the court of appeals' ruling that he failed to show that membership in the AANS is an important economic interest. Without such a showing, a court is precluded from involving itself in the internal affairs of an association under Illinois law. *Kaneria*, 832 F. Supp. at 1230.

Thus, further review by this Court is completely unwarranted.

II. THE DECISION BELOW IS CONSISTENT WITH COMMON LAW PRECEDENT REGARDING THE ABILITY OF A PROFESSIONAL ASSOCIATION TO DISCIPLINE A MEMBER FOR FAILING TO ABIDE BY THE ASSOCIATION'S INTERNAL RULES.

In a transparent attempt to give this case broader appeal, Petitioner argues that the court of appeals' decision departs from "300-year-old insights" which the common law has used to protect our judicial system from manipulation. Contrary to Petitioner's hyperbole, the decision below does not overturn any common law precedent as it relates to protecting witnesses from the threat of subsequent civil liability arising out of their testimony. Rather, the ruling properly reflects the distinction between civil liability and professional discipline and does not call for review by this Court.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that in initiating a prosecution and presenting a state's case, a prosecutor is immune from a civil suit for damages under 42 U.S.C. § 1983. However, the Court emphasized that the policy considerations which compel immunity from civil liability for prosecutors did not preclude professional discipline:

> Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

Id. at 429. Following this Court's lead, numerous other courts have distinguished professional discipline from civil liability and determined that the policies served by protecting witnesses from civil liability as a result of their testimony do not act as a bar to professional discipline.

For example, in *Deatherage v. State of Washington Examining Board of Psychology*, 948 P.2d 828 (Wash. 1997), the Washington Supreme Court held that the witness immunity doctrine did not bar a state licensing board from initiating professional disciplinary proceedings against an expert witness. In so holding, the court stated that a "disciplinary proceeding is not a civil suit against the expert, and the policies that underscore witness immunity do not apply." *Id.* at 831. The court also stated that allowing a professional to be subjected to discipline for unprofessional conduct "serves to advance the court's goal of accurate testimony from expert witnesses, and furthers the disciplinary board's goal of protecting the public." *Id.* at 832. Relying upon the principles enumerated in *Imbler*, the court noted that the threat of professional discipline is an appropriate check on individuals who are otherwise immune from civil liability. *Id.*

Similarly, in *Budwin v. American Psychological Ass'n*, 29 Cal. Rptr. 2d 453 (Cal. Ct. App. 1994), the California Appellate Court held that a professional association is not precluded by the litigation privilege from disciplining a member for making false representations in a judicial proceeding. *Id.* at 458. Drawing on this Court's discussion of amenability to professional discipline in *Imbler*, the California Appellate Court observed that the litigation privilege "has not been extended to preclude professional disciplinary liability." *Id.* at 457. The court also

stated that "a perfectly legitimate objective of professional associations is to attempt to elevate professional standards." *Id.* at 459.[3]

After considering the relevant facts and the applicable law, the court of appeals properly determined that it was not against public policy for the AANS to discipline Petitioner for giving expert testimony that violated the Association's Code of Ethics and Expert Witness Guidelines. The court explained, "this kind of professional self-regulation rather furthers than impedes the cause of justice." (Pet. App. 9.) The court of appeals also observed that the AANS, as well as the community at large, have an interest in Dr. Austin "not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves." (Pet. App. 9.) The decision below is consistent with this Court's decision in *Imbler* as well the decisions of other courts that have had occasion to consider this issue. Accordingly, review by this Court is unnecessary.

Significantly, none of the cases relied upon by Petitioner support his claim that the litigation or testimonial privilege somehow acts as a bar to professional discipline. Petitioner's reliance on this Court's decision in *Briscoe v. LaHue*, 460 U.S. 325 (1983), is misplaced. In *Briscoe*, this Court held that 42 U.S.C. § 1983 does not authorize a convicted person to assert a damages claim against a police officer for giving perjured testimony at

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[3] *See also Silberg v. Anderson*, 786 P.2d 365, 373 (Cal. 1990) (absolute immunity for attorney does not prohibit professional discipline); *Moses v. McWilliams*, 549 A.2d 950, 954 n.7 (Pa. Super. Ct. 1988) (absolute immunity for physician does not prohibit professional discipline).

his criminal trial. *Id.* at 325-326. The Court observed that subjecting government officials such as police officers to damages liability under section 1983 would likely result in an increase in lawsuits and would serve to divert police officers from the effective performance of their public duties. *Id.* at 342-43. There is nothing in this Court's opinion in *Briscoe* which even remotely suggests that it intended to shield a paid expert witness like the Petitioner from professional discipline for giving improper testimony in a judicial proceeding.

Petitioner's reliance on *Konrad v. De Long*, 57 F.R.D. 123 (N.D. Ill. 1972), *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. Spec. App. 1978), and *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) is similarly misplaced. All of these cases are factually distinguishable as they involved threats of witness intimidation made during a pending case in which the witness was testifying. The AANS' policy is to refrain from even considering charges of unprofessional conduct until after the resolution of the underlying suit. (AANS Code of Ethics.)

Finally, Dr. Austin's invocation of the California Appellate Court's decision in *Bernstein v. Alameda Contra Costa Med. Ass'n*, 293 P.2d 862 (Cal. Ct. App. 1956), to support his Petition is flawed. In *Budwin v. American Psychological Ass'n*, the California Appellate Court strictly limited *Bernstein* to its facts, stating as follows:

> Furthermore, as the *Bernstein* court noted implicitly, the ethical rule at issue there prohibited any criticism of the preceding doctor, even if it were truthful and made in good faith. The *Bernstein* court focused on the width of this ethical broad brush, and concluded that its application to disparaging statements made in the course of

> legal proceedings violated the public policy articulated in section 47(b). The court did not hold that section 47(b) precluded a voluntary, professional association from disciplining a member for misrepresentations made in the course of an official proceeding; no California court in nearly 40 years of *Bernstein's* existence has read the decision that way.

Budwin, 29 Cal. Rptr. 2d at 458. The *Bernstein* court's holding does not support Petitioner's claim that he is somehow immune from professional discipline and fails to provide a basis for this Court's review.

III. THE DECISION BELOW DOES NOT CONFLICT WITH *DAUBERT*.

In an attempt to create an issue worthy of writ consideration, Petitioner asserts that the Seventh Circuit's decision "effectively overruled *Daubert*." (Pet. 18.) Petitioner argues that the decision below will allow medical societies such as the AANS to interfere with the "gatekeeping" function of the trial judge in determining the admissibility of expert testimony in judicial proceedings. Petitioner further argues that the AANS' standards governing expert testimony are inconsistent with *Daubert*. Both contentions are meritless.

A. The Decision Below Does Not Interfere With The District Court's Gate-Keeping Role.

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court established a two-prong analysis for determining whether expert testimony is admissible under the Federal Rules of Evidence. The

analysis requires the district court to perform a "gate-keeping" role. *Id.* at 595. First, the district court must determine whether the expert's testimony is based on scientific knowledge. *Id.* at 592. The Court identified four factors that the district court might consider in evaluating scientific validity: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the method's known or potential rate of error; and (4) whether the theory or technique finds general acceptance in the scientific community. *Id.* at 593-594. Under the second prong of the analysis, the district court must determine whether the proffered expert testimony "will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592.

Petitioner's argument that the decision below infringes upon the autonomy of the district court in performing its gate-keeping function is based on a tortured reading of the court of appeals' opinion. Nowhere in the opinion did the Seventh Circuit suggest that the AANS, or any other medical society, has the right or authority to decide the admissibility of expert testimony. Instead, the opinion makes clear that the *Daubert* analysis remains squarely within the exclusive province of the district court. The Seventh Circuit's ruling simply reflects its view that no conflict exists between the district court's gate-keeping function and the AANS' enforcement of its internal rules relating to the content of expert testimony.

Further, nothing in the AANS' rules themselves speaks of admissibility of expert testimony. The AANS' rules require that a member appearing as an expert witness testify "prudently" and "identify as such personal opinions not generally accepted by other neurosurgeons." The rules further require that a member testify-

ing as an expert witness "provide the court with accurate and documentable opinions on the matters at hand." The rules are absolutely devoid of any language relating to admissibility.

The AANS' enforcement of its Code of Ethics and Expert Witness Guidelines also has no impact on the district court's gate-keeping function. The AANS' disciplinary process is an "after-the-fact" self-policing mechanism. The district court's gate-keeping role, on the other hand, involves a pre-testimony screening for reliability and relevance of an expert's opinions. Contrary to Petitioner's suggestion, the gate-keeping role of the district court set forth in *Daubert* in no way prohibits self-policing in the medical community.

B. The AANS' Standards Governing the Content of Expert Witness Testimony Are Not Inconsistent With *Daubert*.

Petitioner asserts that the AANS' standards preclude its members from expressing an expert opinion in court if the "opinion is not found in the medical literature" and that such a blanket rule is forbidden under *Daubert*. Petitioner's argument misstates the AANS' rules. Neither the AANS' Expert Witness Guidelines nor its Code of Ethics contain such a limitation.

The Expert Witness Guidelines require an expert witness to adequately review prior and current concepts related to standard neurosurgical practice in the matter at issue and to distinguish his or her own personal opinions from those generally accepted by other neurosurgeons. (Expert Witness Guidelines 16a(2) and (4).) The Code of Ethics requires an expert witness to "diligently

and thoroughly prepare himself or herself with relative facts so that he or she can, to the best of his or her ability, provide the court with accurate documentable opinions on the matters at hand." (Code of Ethics V(B).) Contrary to Petitioner's assertion, neither standard can be read as a "blanket rule" requiring that an opinion be found in medical literature before it can be expressed in court.[4]

Petitioner's characterization of the AANS standards as applicable only to plaintiffs' experts is likewise flawed. As the court of appeals observed, "[t]here is no basis for Austin's claim that the Association entertains only complaints against members who testify on behalf of malpractice plaintiffs." (Pet. App. 8.) The Expert Witness Guidelines apply to all members, regardless of whether they testify on behalf of plaintiffs or defendants. The decision below is in no way inconsistent with *Daubert* and does not warrant review by this Court.

IV. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS IN MEDICAL MALPRACTICE LITIGATION.

Petitioner argues that the court of appeals' decision will "quickly and dramatically" tilt the playing field in

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[4] By requiring thorough preparation and review of "prior and current concepts related to standard neurosurgical practice in the matter at issue," the AANS' standards are entirely consistent with the factors enumerated in *Daubert* for determining whether an expert's opinion is based on scientific knowledge. Similarly, the AANS' requirement that members serving as expert witnesses distinguish personal opinions from those generally accepted as the proper standard of care also correlates with the factors enumerated in *Daubert*.

medical malpractice litigation "in favor of defendants." Indeed, he goes so far as to suggest that the court of appeals "effectively has given the AANS, and every other medical society, the power to control medical malpractice litigation against doctors."[5] Petitioner's argument greatly overstates the significance of the decision below and fails to create an issue worthy of writ consideration.

Grasping at straws, Petitioner suggests that the AANS' Expert Witness Guidelines and Code of Ethics, as written and applied, are designed to punish and/or "silence" plaintiff's experts. Significantly, Petitioner fails to cite any section of the Expert Witness Guidelines or Code of Ethics that is inherently biased against members who choose to testify on behalf of plaintiffs in medical malpractice actions. The Expert Guidelines and Code of Ethics set forth guiding principles for the content of expert testimony. The provisions apply to the expert testimony of any member, regardless of whether the opinion testimony is rendered on behalf of a plaintiff or a defendant.[6]

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[5] Petitioner asserts that by filing an *amicus curiae* brief in support of the AANS, the American Medical Association, the Illinois State Medical Society and the American College of Surgeons demonstrated that "they, too, plan to implement similar rules." There is nothing in the record which supports Petitioner's baseless assertion.

[6] Although, as Petitioner points out, the majority of charges have been brought against members who testified on behalf of plaintiffs, there is nothing in the Expert Witness Guidelines or Code of Ethics that prevents a member from bringing a charge of unprofessional conduct against a member who testified for a defendant. Indeed, Petitioner himself filed a

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Further, Petitioner's argument that the AANS' Expert Witness Guidelines will deter the great majority of surgeons from testifying as experts on behalf of plaintiffs is undermined by Petitioner's own behavior. As the court of appeals observed, Petitioner "continues to testify extensively as an expert witness in medical malpractice cases." (Pet. App. 7.) Thus, the perceived threat of "severe economic sanctions" certainly has not deterred Petitioner from testifying as an expert on behalf of plaintiffs.

Petitioner's argument is further undercut by the limited number of proceedings instituted under the Expert Witness Guidelines and the even fewer number of actions that resulted in suspension or expulsion from the AANS. Since the adoption of the Expert Witness Guidelines in 1983, a total of twenty disciplinary proceedings have been brought against members who were alleged to have provided improper testimony on behalf of a plaintiff. Of those twenty proceedings, four resulted in suspension of membership and one resulted in expulsion from the AANS. (Answer to Pl.'s Interrogs.) These are hardly the type of figures that will "quickly and dramatically" tilt the playing field in medical malpractice litigation. Simply stated, this case will have little to no impact on medical malpractice litigation and does not warrant this Court's review.

(...continued)
charge of unprofessional conduct against a member he accused of giving improper expert testimony on behalf of a defendant doctor. Petitioner subsequently elected not to prosecute the charge.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 6th day of November, 2001.

Respectfully submitted,

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